



January 31, 2022

Professor Poonam Puri
c/o Ombudsman for Banking Services and Investments
pp@poonampuri.ca

Dear Professor Puri:

RE: Independent Evaluation of the Ombudsman for Banking Services and Investments with Respect to Investment Related Companies (the "Evaluation")

The Investment Industry Association of Canada (IIAC) is the leading national association representing dealers who provide the vast majority of the financial services provided to Canadian retail investors. The IIAC represents dealers of every size and type such as Canadian bank owned dealers, independent and foreign dealers. Our members distribute a variety of securities such as mutual funds and other managed equity and fixed income funds and provide a diverse array of portfolio management, advisory and non-advisory services.

Summary: There have been positive developments at the OBSI which include matters such as timeliness and accessibility. Standards of independence, fairness, and core methodologies, particularly in larger, complex cases require enhancement.

Some key recommendations include increasing investor choice through:

- The use of independent, experienced third party mediators within the current OBSI process, at the investor's option.
- A wider, more fulsome discussion regarding other low cost, flexible, dispute resolution options and service providers for investors.

The IIAC appreciates the opportunity to participate in the Evaluation. Our comments are as follows:

A. With Respect to Positive Developments:

- **Timeliness**

Generally, the OBSI has improved the timeliness of its process.

- **Efficiency**

The OBSI has shown efficiency in smaller dollar, less complex cases.

- **Accessibility**

We find the OBSI's services to be highly accessible. Firms are required to provide investors with information about the OBSI at account opening when a complaint is received and with their response to the complaint.

- **Information Sharing and General Approach**

The OBSI has improved its communications with firms through regular check-ins on ongoing investigations, and a relatively more collaborative approach than in the past. The OBSI generally makes certain staff available to CSA members for discussions on approach and resolution.

The expanded disclosure about cases have been helpful at times.

The technological improvements undertaken in the past number of years have assisted with documentation submission and security.

A. With Respect to Areas of Enhancement:

- **Independence and Standard of Fairness**

The OBSI does not consistently consider and weigh all relevant facts, documents and regulation. At times, the results can be seen as outside the range of fair or reasonable.

Matters of suitability, and credibility assessment (and the impact of lack of credibility) remain longstanding challenges. The calculation of damages is not always fair. Concepts such as contributory negligence, negligence and loss of opportunity are inconsistently applied to the facts, to achieve a desired result.

Results are inconsistent and vary with staff. Staff abilities vary particularly with respect to issues raised in more complex cases, including suitability assessments.

In addition, pursuant to NI 31-103 s. 13.16 (6), registered firms outside of Quebec are required to make the OBSI, the sole dispute resolution service available to their clients. A monopoly imposed by regulation compromises both investor choice and the (appearance of) impartiality, independence and objectivity of the sole dispute resolution service.

Recommendation: For larger, more complex cases, involving matters such as suitability, nuanced damages assessments and credibility, the OBSI should recommend a short mediation by an independent, experienced third party. Third party mediators may be subject to an approval process outside of the OBSI. The availability of third-party mediators and other alternative dispute resolution services, which may also

be subject to an approval process outside of the OBSI, provides a resolution to this and concerns raised regarding current restrictions imposed by s. 13.16(6) of NI 31-103.

Some resolution may lie in staffing considerations as well.

- **Core Methodologies**

The reasons the OBSI provides for its recommendations, at times, prove challenging due to reasonable disagreement on the characterization of facts and analysis. They can be the greater impediment to resolution.

Recommendation: Options for flexibility of process to include options for resolution without written reasons, may assist to achieve timely resolution in certain circumstances.

i) With Respect to Certain Additional Questions Posed as Follows:

- **Why do you think some firms refuse to compensate consumers in the amount recommended by the OBSI or at all when a positive recommendation is given by the OBSI?**

There may be reasonable disagreement by the firm based on the facts. For example, Joint CSA Staff Notice 31-351, IIROC Notice 17-0229, MFDA Bulletin #0736-M – Complying with requirements regarding the Ombudsman for Banking Services and Investments states in part as follows on behalf of CSA, IIROC and MFDA Staff:

“Staff will not assume that there is a compliance failure at every registered firm that does not comply with an OBSI recommendation by refusing to compensate a client or by settling below OBSI’s recommended compensation. Staff will also not automatically commence a review in every case.”

Refusals to compensate in accordance with an OBSI recommendation are highly unusual. The OBSI’s 2020 Annual Report states in part:

“The majority of complaints brought to OBSI are successfully resolved. However, this year, we published two cases from two exempt market dealer firms that did not follow OBSI’s recommendations to compensate the consumer after causing them financial harm.”

The next most recent firm refusal was one in 2016.

- **How effective do you consider the “naming and shaming” system to be?**

The system has been effective as evidenced by its very rare use.

- **Should the \$350,000 limit on the OBSI’s compensation recommendations be increased?**

According to the 2020 OBSI Annual Report, the average and median recommendations for 2020 were \$9,250 and \$2,425, respectively. Increasing the limit is not appear necessary.

An increased limit would require very notably increased procedural fairness which may in turn increase investor costs and length of process and undermine efficiency and accessibility.

- **What powers do you think the OBSI should have and, specifically, do you think the OBSI should have authority to issue binding decisions?**

The OBSI does not require, nor should it have, binding authority. Given the relatively small average and median compensation recommendations as noted above, and the very infrequent refusals to offer compensation, binding authority is unwarranted. In addition, binding authority would require notably increased procedural fairness. An appropriate approach to procedural fairness comprises full rights of appeal to a court of law. These necessary enhancements are accompanied by costs and length of process.

Questions with respect to binding authority for the OBSI raise broader questions regarding providing investors with more alternative dispute resolution options for their benefit. As currently drafted, s. 13.16(6) of NI 31-103 denies investor choice. A wider, more fulsome discussion of other low cost, flexible choices including third party mediation, is needed.

Thank you for considering our comments. If you have any questions, we would be pleased to meet at your convenience.

Sincerely,

Investment Industry Association of Canada